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Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

WILLIAM HATCHER,

Petitioner,

v.

F. GATES PEED, JUDGE, SUPERIOR COURT OF EFFINGHAM COUNTY, GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed the district court's dismissal of Petitioner's suit for damages pursuant to 42 U.S.C. § 1983, filed following a hearing on a motion for a temporary protective order sought by Petitioner's adult daughter. At the conclusion of the hearing, Respondent Judge F. Gates Peed ordered Petitioner taken into custody even though Petitioner was on bond and had neither violated the terms of his bond nor committed a contempt. Respondent refused to state why Petitioner was being arrested and refused to entertain the issue of bail. Respondent then ordered that Petitioner's adult daughter have visitation with her two (2) half-brothers, even though the issue of visitation and custody was not before the court, the children's mother was not a party to the action, and no theory of law would provide for such visitation. In affirming the district court's dismissal of Petitioner's suit, the Eleventh Circuit misapplied this Court's rulings regarding judicial immunity, which has become common at the circuit court level.

Two (2) questions are presented:

1. Does a state court judge lose the protection of judicial immunity by departing from his judicial function when he interrupts a civil hearing to conduct independent investigation of one of the litigants without informing the parties of the action, orders the arrest of the party without enunciating a reason therefore, refuses to entertain the issue of bail, and arranges for the issuance of a warrant by the district attorney upon the sheriff's refusal to prepare a warrant for the judge?

2. Does a judge act in the clear absence of all jurisdiction for purposes of judicial immunity by entering a custody order on children whose custody is not an issue before the court, was not enumerated as a claim for relief, cannot be legally ordered, where the mother of the children is not a party to any proceeding?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished. The opinion was entered and filed May 10, 2005. The decision of the Eleventh Circuit affirmed the December 21, 2004 judgment of the United States District Court for the Southern District of Georgia dismissing Petitioner's suit.

STATEMENT OF JURISDICTION

The Eleventh Circuit's opinion was rendered on May 10, 2005. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42, United States code, Section 1983

Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial

> capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable to the District of Columbia shall be considered a statute of the District of Columbia.

As a component of the cause of action provided by that statute, due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution also are implicated.

STATEMENT OF THE CASE

1. Petitioner William Hatcher asserts in this case that judicial immunity does not protect the actions of a state court judge who acts as a prosecutor and who enters an order on a matter not before the court in a clear absence of all jurisdiction. Petitioner commenced this action on May 27, 2004 by filing his complaint in the United States District Court for the Southern District of Georgia alleging two (2) counts against Respondent for damages pursuant to 42 U.S.C. § 1983. On December 21, 2004 the district court entered its order and judgment dismissing Petitioner's suit on principles of judicial immunity. Plaintiff thereafter timely noticed his appeal to the United States Court of Appeals for the Eleventh Circuit on January 4, 2005. That court affirmed by judgment entered May 10, 2005.

2. Petitioner William Hatcher is married to Stephanie Hatcher and together they have two (2) sons, ages 10 and 12. Petitioner also has a daughter by a prior relationship, April Hatcher. In 1998 at the age of 15, April came to live with Petitioner, his wife and their two sons.

In the autumn of 2002, April left for college at Georgia Southern University. However, at the end of her freshman year she had not maintained the requisite grade point average to keep her academic scholarship. She moved back to Rincon, Georgia to live with Plaintiff and his family, and commuted to school. Under this arrangement, her grades improved somewhat, but she claimed that she could not study because of all the noise in the house. Commencing in the autumn of 2003 Petitioner permitted April to live in a house in Effingham County, Georgia owned by his mother but managed by Petitioner. April Hatcher did not have to pay rent, and Petitioner paid her utilities. April continued to commute to college.

In the first week of April, 2004 Petitioner could not reach April by telephone for several days. On Saturday, April 10, 2004 Petitioner took his two (2) sons to a Boy Scout activity near the house, and stopped to check on April. As Petitioner was speaking to his daughter a young man jumped out of the bedroom closet.

Petitioner did not know the identity of this young man, but knew that it was not her boyfriend. Petitioner retrieved his pistol from his vehicle as the young man was about to leave, and allegedly pointed the gun at the young man demanding to know his name. The young man shortly thereafter called the Effingham County Sheriff's office, and a report was taken based on a claim of aggravated assault. By that evening, however, April Hatcher was claiming that her father had been sexually assaulting her for five (5) years.

The Sheriff's Office investigated the incident and April Hatcher's allegations over the next several weeks. Petitioner voluntarily went to the Sheriff's Office and gave a statement,

as did his wife and the young man in the closet, one Brian Saxton. On April 23, 2004 Detective Rhodes of the Effingham County Sheriff's Office obtained criminal warrants from the Magistrate Court of Effingham County against Petitioner for misdemeanor sexual battery against April Hatcher and felony aggravated assault against Brian Saxton. Petitioner turned himself in to Effingham County authorities on April 29, 2004 and by agreement was permitted to post bond in the amount of $5,000.00.

3. On April 12, 2004 April had filed a petition for a temporary protective order against Petitioner in the Superior Court of Effingham County. This domestic relations petition came on for hearing on May 26, 2004 in the Superior Court of Effingham County, Georgia before Respondent F. Gates Peed as the presiding judge. During the hearing the Respondent called a recess. During this recess, without notice to the parties, Respondent undertook to investigate the status of criminal charges against William Hatcher. Respondent Peed, at a minimum, engaged in ex parte inquiry with an investigator in the district attorney's office, Rick Dailey. What else Respondent did during this recess is not yet known.

Significantly, April Hatcher did not testify in presenting her case. Petitioner called her to the stand for cross-examination. William Hatcher did not testify.

At the conclusion of the evidence, Respondent ordered the deputies present in the courtroom to take William Hatcher into custody. Respondent would not give any basis for this order. Respondent would not state for what offense William Hatcher was being arrested. Respondent had not violated the terms of his bond. He had not committed a contempt of court. No warrants were extant.

Counsel explained to the court that William Hatcher already was being prosecuted and was on bond, but Respondent vaguely replied only that he was arresting Petitioner for "other crimes". Respondent Peed, having incarcerated William Hatcher without legal process and without telling him what he was accused of, refused to consider the issue of bond.

After Petitioner had been led away by sheriff's deputies, counsel for April Hatcher requested visitation rights with her two (2) half-brothers. Counsel for Petitioner refused. Peed ordered that the protective order include visitation between April Hatcher and her two half-brothers. This relief was not prayed for in the petition, nor was any evidence adduced as to this issue. Further, the children's mother, Stephanie Hatcher, was not a party to the proceedings, nor was custody or visitation of these children at issue in the case. Georgia law does not provide for visitation rights for a half-sibling.

Petitioner commenced this suit the following day, alleging civil rights violations of due process and privacy. Petitioner also filed a state court habeas corpus action; at hearing on Friday, May 28, 2004 the Sheriff of Effingham County testified that at the time Respondent Peed ordered Petitioner's arrest, neither the Sheriff nor any of his deputies possessed probable cause to believe that Petitioner had committed any crime other than those for which warrants already had issued in April, 2004.

At Respondent Peed's behest, investigator Daily of the district attorney's office twice contacted the Sheriff's Office attempting to get a law enforcement officer to prepare and submit warrants for the arrest Peed had ordered. The Sheriff's Office refused. Eventually, Daily drew warrants and submitted them, to Respondent Peed, for signature. It is the only time Daily ever has drawn a warrant.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO ESTABLISH WHETHER IMMUNITY PROTECTS A JUDGE FROM EVERY ACT UNDERTAKEN AS A JUDGE

A civil complaint should not be dismissed "unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Petitioner's complaint sets forth claims which are demonstrably capable of proof. The record in this case is conclusive that Respondent violated Petitioner's rights under 42 U.S.C. § 1983 and judicial immunity does not protect this Respondent. Petitioner's complaint states a cognizable claim entitling Petitioner to proceed in the district court with this suit. As such, the circuit court erred in affirming the dismissal of Petitioner's complaint.

The district court held that dismissal was warranted because judicial immunity deprives Petitioner even of an opportunity to discover and assemble his case. In its analysis, the district court incorrectly found no exceptions to judicial immunity in this case. Specifically, the district court held that the Respondent did not act in a clear absence of all jurisdiction. However, as to the criminal prosecution of Petitioner, Respondent was not acting in a judicial capacity, but rather performed prosecutorial acts for which he does not enjoy immunity. Further, in ordering April Hatcher to have visitation with her two (2) half-brothers, Respondent Peed acted in a clear absence of all jurisdiction.

The doctrine of judicial immunity from suit for damages is deeply ingrained in our jurisprudence; according to this

Court, judicial immunity dates back at least to the seventeenth century. Judicial immunity has been held applicable to civil rights claims, despite some considered views that the legislation is not intended to except judges from its provisions. *Pierson v. Ray*, 386 U.S. 547 (1967) (*see* Douglas, J., dissenting). The traditional rationale for judicial immunity is that judges cannot perform their function as independent arbiters if the threat of suit clouds their every act and decision.

This Court has held that judicial immunity is not available in two (2) instances: (1) when the judge commits a non-judicial act, or an act not taken in the judge's official capacity, or (2) when the judge acts in a judicial capacity, but completely without jurisdiction. *See Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286 (1991). Applying these principles to the instant case, any of Respondent's wrongful actions which may be said to have been accomplished in a judicial capacity were accomplished in a clear absence of all jurisdiction. Respondent's actions of investigating Petitioner, ordering his arrest while refusing to give a basis, or entertain bond, are non-judicial, prosecutorial acts for which Respondent enjoys no immunity.

Under Georgia law, jurisdiction means the power of a court to render a binding judgment in the case. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979). It is not enough that a court *could* possess jurisdiction. For example, worker's compensation cases in Georgia are appealable from the administrative board to the superior court, but the appeal must be taken to the correct superior court or jurisdiction does not obtain. *Porter v. Employers Liability Insurance Co.*, 85 Ga. App. 497, 69 S.E.2d 384 (1952). Similarly, although superior courts in Georgia are vested with jurisdiction over child custody cases, a superior court may not modify the terms

of a foreign judgment on custody until its jurisdiction is invoked by the domestication of the foreign judgment. *Kempton v. Richards*, 233 Ga. App. 238, 503 S.E.2d 876 (1998). A superior court is vested with discretion to modify its judgments during the term of court at which they are rendered; upon expiration of the term of court of rendering, however, the court does not possess jurisdiction to amend or modify a judgment. *City of Cornelia v. Gunter*, 227 Ga. 464, 181 S.E.2d 489 (1971). In appellate practice, it is a jurisdictional requirement that a complaining party file a notice of appeal, notwithstanding the statutory conference of jurisdiction to hear those *types* of appeals. *Raymond v. State*, 162 Ga. App. 493, 292 S.E.2d 196 (1982).

At the May 26, 2004 hearing on the temporary protective order, Respondent, as judge of the Superior Court of Effingham County, possessed jurisdiction over William Hatcher and April Hatcher as parties to the action. Respondent did **not** possess jurisdiction over Stephanie Hatcher, Petitioner's wife. Nor did he possess either in personam or subject matter jurisdiction over William and Stephanie Hatcher's two (2) children. No action was pending which concerned custody or visitation of the children. No prayer for relief regarding the two (2) children or Stephanie Hatcher was a part of the temporary protective order sought by April Hatcher.

Similarly, the criminal warrants against Petitioner were not of record in the Superior Court of Effingham County. Although warrants had issued from the Magistrate Court of Effingham County, alleging aggravated assault against the boy in the closet and misdemeanor sexual battery against April Hatcher, no criminal case was before the Superior Court.

The district court held that because the superior courts of Georgia are vested with jurisdiction to entertain child custody cases, Respondent did not act in an absence of all jurisdiction. On this basis, the district court held that Respondent was entitled to judicial immunity. The district court further held that Georgia law specifically provides that a judge may issue a criminal warrant on the information of others given under oath. O.C.G.A. § 17-4-40. However, this analysis overlooks the immediately preceding statute, O.C.G.A. § 17-4-39, which governs the preparation of warrants. The Georgia system of criminal procedure expressly contemplates that a warrant first be applied for, then signed. The district court's failure to consider the statutes in pari materia results in a misstatement of law.

The court of appeals upholds the district court's dismissal with little explication. At its most basic level, the broad application of judicial immunity found by the lower courts would result in the anomalous result that a superior court judge could enter custody orders on any child within the state, without a petition having been filed to invoke the court's jurisdiction. Likewise, any person appearing in court faces the possibility that the judge will effect a warrantless arrest of them and make legal disposition of that person's children, all without notice or an opportunity to be heard. According to the lower courts, judicial immunity always protects such a judge from the consequences of his or her actions. Such a view cannot be the law.

This Court in *Bradley v. Fisher*, 13 Wall 335, 20 L. Ed. 646 (1872) distinguished between instances where a court acts in an excess of jurisdiction, as opposed to an absence of jurisdiction; the former are not actionable under any circumstances. The Court went on to hold that a judge loses

his or her immunity only when acting in the clear absence of jurisdiction. This doctrine has been broadly applied to protect judges who improperly overreach their authority, even where the judge acted with malice, spite, or ill-will. However, the Court in *Bradley v. Fisher* also noted, in words mostly forgotten, that

> [t]he discretion vested in courts, where private rights are concerned, is judicial, not unlimited . . . Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

Respondent F. Gates Peed well knew that he possessed no personal or subject matter jurisdiction over Petitioner's wife and children. The petition for temporary protective order invoked the jurisdiction of the Superior Court of Effingham County to hear that matter and no other. Respondent's exercise was a "usurped" authority. *Bradley v. Fisher*, supra. Respondent was wholly without legal authority to make any ruling whatsoever regarding custody or visitation of Petitioner's children. Under these facts, no excuse is permissible.

The district court relied upon *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985) as an example of a case in which the Respondent judge did not lose immunity even though he entered an order without jurisdiction over one of the parties to the underlying suit. However, in *Dykes*, the Petitioner/husband filed a petition specifically praying for custody of his son. The judge in *Dykes* thus was not acting in the clear absence of all jurisdiction, because his subject matter jurisdiction had been invoked as to custody.

In the instant case, no matter concerning custody of William and Stephanie Hatcher's children was pending. April Hatcher's prayer for relief did not even mention Petitioner's children. Respondent Peed clearly was without jurisdiction to entertain any request for visitation or custody. Judicial immunity does not protect Respondent for these acts.

The same applies to the criminal process which Respondent instituted against Petitioner. The Superior Court of Effingham County did not possess jurisdiction over any criminal matter involving Petitioner. No warrant had issued by the Superior Court of Effingham County. The only warrants which had issued were those of the Magistrate Court of Effingham County, and these warrants had been executed. No presentment to a grand jury had been made, nor had the warrants been bound over to the Superior Court of Effingham County. On May 28, 2004 the Sheriff of Effingham County testified that, at the time of William Hatcher's arrest in open court two (2) days earlier, neither he, nor to the best of his knowledge, any of his deputies, possessed probable cause to believe that William Hatcher had committed any crime, other than the warrants which had issued the previous month.

A judge is not absolutely immune for administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform. *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988). In determining whether an action is "judicial" this Court considers the nature of the act and whether it is a function normally performed by a judge. *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). The Court more specifically has held that a judge is not entitled to judicial immunity when acting in an enforcement capacity. *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980).

The Sixth Circuit has held that, despite its breadth, judicial immunity does not protect a judge who is performing purely prosecutorial functions involved in initiating a criminal prosecution, especially where such a prosecution is initiated based upon the judge's private interests, completely separate from cases brought to court independently by the parties. *Barnes v. Winchell*, 105 F.3d 1111 (6th Cir. 1997). Accord *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984). Likewise, the Seventh Circuit has held that a judge's prosecutorial actions are not protected by immunity. *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980).

Respondent's actions in investigating Petitioner, arresting him, and then searching for someone to draw a warrant, are not the kind of functions normally performed by a judge. *Stump v. Sparkman*, *supra*. When Respondent called a brief recess, he used the opportunity to seek extra-judicial information from one Rick Dailey, an investigator with the district attorney's office. Respondent apparently learned of the warrants and bond and decided that the Sheriff's prosecution was not sufficient. Despite the decision of the Sheriff's Office not to proceed on the sex abuse allegations belatedly made by April Hatcher, Respondent unilaterally presumed to effectuate such a prosecution. In so doing, Respondent performed non-judicial functions for which he enjoys no immunity. Unlike the situation in *Mireles v. Waco*, supra, the function of the court was not dependent upon the action taken by the judge. Whereas Judge Mireles required the presence of attorney Waco to proceed with the court's business, the prosecution of Petitioner Hatcher had nothing to do with the hearing on the temporary protective order.

Respondent Peed abandoned his capacity as a judge and actively sought information upon which to prosecute William Hatcher. However, Respondent did not advise Petitioner of this fact. Nothing in the law governing temporary protective orders provides for arrest. Had Petitioner known that he might be arrested, his decision not to testify or offer other evidence well might have been different. Because it was known only to Respondent Peed that arrest was imminent, Petitioner had neither notice nor an opportunity to be heard in reference to criminal prosecution.

Most egregiously, Respondent, after ordering Petitioner arrested, refused to state the nature of the charge. In so acting, Judge Peed committed a fundamental deprivation of due process, accomplished under color of law.

CONCLUSION

Application of judicial immunity in so broad a fashion as has occurred in the circuit courts of appeal encourages lawlessness on the part of judges. The Court should accept the instant petition as an opportunity to define the outer limits of protected judicial misconduct. The judgment of the circuit court must be reversed or the public will, justifiably, have no reason for confidence in the integrity of their judiciary.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 10, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10139
Non-Argument Calendar

D. C. Docket No. 04-00063-CV-6

WILLIAM E. HATCHER,

Plaintiff-Appellant,

versus

F. GATES PEED, Judge,
Superior Court of Effingham County, GA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(May 10, 2005)

Before DUBINA, HULL and WILSON, Circuit Judges.

PER CURIAM:

Plaintiff/Appellant William E. Hatcher filed an action against the Honorable F. Gates Peed ("Judge Peed") of the

Appendix A

Superior Court of Effingham County, Georgia, under 42 U.S.C. § 1983. Specifically, Hatcher alleges that Judge Peed violated Hatcher's due process rights by ordering his arrest without cause and granting his adult daughter visitation rights to his minor children. The district court granted Judge Peed's motion to dismiss on the ground of judicial immunity. Hatcher then perfected this appeal.

This court reviews *de novo* a district court's dismissal of a complaint. *Simmons v. Sonyika*, 394 F.3d 1335 (11th Cir. 2004).

After reviewing the record and reading the parties' briefs, we conclude that the district court correctly dismissed the action against Judge Peed based on the doctrine of judicial immunity. *See Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L. Ed. 2d 9 (1991); *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985). Accordingly, we affirm the district court's judgment of dismissal.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, STATESBORO DIVISION DATED DECEMBER 21, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

604CV063

WILLIAM HATCHER,

Plaintiff,

v.

F. GATES PEED, Judge, Superior Court of Effingham County, Georgia,

Defendant.

ORDER

I. INTRODUCTION

Plaintiff William Hatcher brings this 42 U.S.C. § 1983 action against F. Gates Peed, a Georgia superior court judge. He alleges that Judge Peed violated his due process rights by ordering Hatcher's arrest without cause and granting his adult daughter visitation rights to his minor children.

Doc. # 1. Judge Peed moves over plaintiff's opposition to dismiss[1] the Complaint and impose F.R.Civ.P. 11 sanctions on both Hatcher and his attorney. Doc. ## 3, 4.

II. BACKGROUND

Hatcher asserts that he was accused of improper, criminal acts against his twenty-year-old daughter, April Hatcher.[2] Doc. # 1 at 2. She petitioned for a Temporary Protective Order, and Hatcher was subsequently charged with sexual battery and simple battery. *Id.*He.surrendered and was released by a Georgia magistrate judge on $5,000 bond. *Id.*

Judge Peed granted April's petition during a 5/26/04 hearing in Georgia superior court. *Id.* at 3. At the conclusion of the hearing, he also ordered the sheriff to take Hatcher into custody. *Id.* Hatcher's counsel, Gregory N. Crawford, inquired as to the reason for arresting Hatcher, to which the Judge responded, "Based on what I've heard here today." *Id.* at 4. Crawford then stated that Hatcher had already been arrested and posted bond. *Id.* at 3-4. Judge Peed responded that he was being arrested for "other offenses." Doc. # 4 exh. 1 at 49.

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1. On dismissal motions the Court accepts the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1262 (11th Cir. 2004).

2. Counsel refers to Hatcher's daughter as "April" in his Complaint (doc. # 1 at 2) and "Tiffany" in his brief. Doc. # 4 at 1. The Court will continue to refer to her as April, since that is the name reflected in the superior court's transcript. Doc. # 3 exh. 1 at 1.

Appendix B

Hatcher argues that no legal basis existed for his incarceration. Doc. # 4 at 3-4. He did not commit contempt, and did not even testify at the hearing. No warrant was issued, no charge articulated, and no reason provided for this extraordinary act. *Id.* Plus Judge Peed refused to even consider the issue of bond. *Id.* at 3. Hatcher has since remained incarcerated pending trial. *Id.* at 4.

While still on the record, April's counsel asked Judge Peed to order visitation rights with her two half brothers (Hatcher's 10 and 12 year-old sons). *Id.* at 1, 4. Through counsel, Hatcher refused to consent. *Id.* at 4. Even though April did not seek visitation rights in her petition and the children's mother was not part of the proceeding, Judge Peed nevertheless granted April's request. *Id.*

Hatcher filed this action the next day and, invoking F.R.Civ.P. 4(d)(2), forwarded a copy of the Complaint, Summons and an acknowledgment of service to Judge Peed on 5/31/04. Doc. # 6 at 1. Judge Peed refused that service and responded with a 6/18/04 letter informing Hatcher and Crawford of his intent to request Rule 11 sanctions. Doc. # 3 exh. A.

Though denying that he had been properly served, Judge Peed then filed an 8/5/04 "Motion for Rule 11 Sanctions Including Dismissal of the Lawsuit." Doc. # 3. Hatcher finally effected service on 9/21/04 and moved for entry of default judgment on 11/12/04. Doc. # 6.

Appendix B

III. ANALYSIS

A. Default

F.R.Civ.P. 12(a)(1)(A) requires defendants to serve an answer "within 20 days after being served with the summons and complaint." However, Rule 12(a)(4) postpones this period upon service of a motion to dismiss the complaint. In that case, the defendant need not file an answer until "10 days after notice of the court's action" upon the motion. *Id.*

Judge Peed's 8/5/04 "Motion for Rule 11 Sanctions Including Dismissal of the Lawsuit" (doc. # 3), though filed before being properly served, qualifies as a motion to dismiss. Hence, he need not file an answer until 10 days after the Court's resolution of that motion. The Court therefore denies Hatcher's motion for entry of default judgment. Doc. # 6.

B. Dismissal

Claiming judicial immunity from suit, Judge Peed moves to dismiss the case. Doc. # 3. A judge enjoys judicial immunity when acting in his judicial capacity and not in clear absence of all jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). A judge acts in his judicial capacity when performing an "act of the sort normally performed by judicial officers." *Emory v. Peeler*, 756 F.2d 1547, 1553 (11th Cir. 1985).

Hatcher does not contest that Judge Peed was performing in his judicial capacity. Instead, he asserts that it is "beyond

dispute that Defendant possessed no jurisdiction to commit these acts." Doc. # 4 at 6. While admitting that Judge Peed had personal jurisdiction over him and subject matter jurisdiction over the protective-order issue, he insists that the Judge nevertheless lacked subject matter jurisdiction over any criminal matter. Doc. # 4 at 5. Thus, he had no jurisdiction to order Hatcher's arrest. *Id.*

Hatcher also argues that Judge Peed did not have personal jurisdiction over Stephanie Hatcher (plaintiff's wife and mother of his two minor children) or his two sons. *Id.* And April's petition for protective order, he says, did not provide subject matter jurisdiction over the visitation issue. *Id.* Granting visitation rights to his adult daughter (who is unrelated to Stephanie Hatcher) therefore was clearly beyond the Judge's jurisdiction. *Id.*

Judge Peed claims he did have jurisdiction to arrest Hatcher: "Judge Peed could incarcerate all of the participants, attorneys, or even spectators for contempt of court and would have immunity for virtually any action during said proceedings, including incarceration of individuals based upon live testimony." Doc. # 5 at 2. He fails, however, to even assert that anyone had acted contemptuously that day. Nor does he propose a jurisdictional basis for awarding visitation rights concerning the two minor children.

The Eleventh Circuit addressed a similar case in *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985). There a father, without informing his wife, schemed to obtain a colorable court order awarding him custody of their son. *Id.* at 944.

He convinced a Florida judge to sign an order declaring his son to be a "dependent child" and temporarily awarding him with custody. *Id.*

The mother then brought a § 1983 suit against, *inter alia*, the judge. *Id.* She claimed the judge acted in "clear absence of all jurisdiction" because he lacked both personal and subject matter jurisdiction. *Id.* at 946. But because state law gave the court "original jurisdiction of proceedings in which the child is alleged to be dependent" and the petition presented to him alleged that the boy was a dependent child, the judge had subject matter jurisdiction. *Id.* at 946-47.

Yet, the judge there lacked personal jurisdiction over one of the parties to the dispute, the mother. *Id.* at 947. Nevertheless, the *Dykes* court concluded that a judge acting in absence of personal jurisdiction does not lose judicial immunity on that basis alone. *Id.* at 950. It reasoned that "[u]nlike questions of subject matter jurisdiction, which generally require only statutory [interpretation], personal jurisdiction depends upon facts that a judge is not likely to be able to verify first hand." *Id.* at 949. Often, "the question of whether a nonresident can be reached by the court's process cannot be decided until the litigation is well underway." *Id.* Hence, there must be an absence of subject matter jurisdiction to defeat a judge's assertion of immunity. *Id.* at 948.

Because questions regarding subject matter jurisdiction also can be complex, "the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." *Stump*, 435 U.S. at 356. That is why courts further distinguish an *absence* of subject matter jurisdiction from an *excess* of subject matter jurisdiction. For example,

> if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Stump, 435 U.S. at 357 n.7 (citing *Bradley v. Fisher*, 80 U.S. 335, 352 (1871)). Hence, in order to lose judicial immunity, a judge must do more than wrongly exercise his power, he must have lacked that power completely. *King v. Myers*, 973 F.2d 354, 357 (4th Cir. 1992).

The facts alleged here go beyond those considered in *Dykes*. As to the visitation issue, Hatcher says that Judge Peed lacked personal jurisdiction over *all* parties. He asserts that neither Hatcher, his wife, nor his children received summons concerning the issue of visitation rights to Hatcher's children. *See* Doc. # 4 at 5. In *Dykes*, the court lacked personal jurisdiction over only the mother. And, unlike in *Dykes*, Hatcher argues that Judge Peed lacked subject matter jurisdiction over the visitation issue because April's petition simply did not invoke his court's jurisdiction over it. *Id.*

Hatcher also argues that Judge Peed lacked subject matter jurisdiction over his arrest. Doc. # 4 at 5. Because the hearing concerned only a petition for protective order, and no criminal issue, he argues that Judge Peed clearly lacked jurisdiction to order his incarceration. *Id.*

Appendix B

Georgia superior courts have broad subject matter jurisdiction. *See* GA. CONST. Art. VI, § IV, ¶ I ("The superior courts shall have jurisdiction in all cases, except as otherwise provided in this Constitution"). Specifically, superior court judges "may issue a warrant for the arrest of any offender against the penal laws, based on probable cause either on the judge's or officer's own knowledge *or on the information of others given to the judge or officer under oath*." O.C.G.A. § 17-4-40 (emphasis added). They may also order "the arrest of a defendant believed to have violated a condition of bond where the arrest order is supported by the personal knowledge of the judge or by affidavit or testimony establishing a reasonable belief that a violation of a condition of bond has occurred." *Hood v. Carsten*, 267 Ga. 579, 583 (1997).

Superior courts also have subject matter jurisdiction over visitation rights. The grant of visitation privileges is tantamount to modification of custody. *Pritchett v. Merritt*, 263 Ga.App. 252, 253 (2003); *see also Hopkins v. Hopkins*, 237 Ga. 845, 846 (1976) ("Visitation rights are a part of child custody and as such are controlled by the law relating to custody and change of custody"). And superior courts generally have subject matter jurisdiction over child custody cases. *See* GA. CONST., Art. VI, § IV, ¶ I; O.C.G.A. §§ 15-6-8 and 19-9-1; *Dyer v. Surratt*, 216 Ga.App. 876, 876 (1995).

Hence, Judge Peed had subject matter jurisdiction over both the criminal and custody subject matters, even though he may have lacked the authority to rule on the specific issues in Hatcher's case. *See Patterson v. Ellerbee*, 268 Ga. App. 826, 829 (2004) (subject matter jurisdiction "provides for jurisdiction over the class of cases to which a particular case

belongs, and does not mean simply jurisdiction of the particular case then occupying the attention of the court") (quotes and cites omitted).

Other courts have used the "excess of jurisdiction" distinction to extend a wide, protective net for judicial actions. *See Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980) (holding that state-court judge who arraigned, convicted, and sentenced an accused without the assistance of a prosecutor, defense attorney, court reporter, or court clerk nevertheless was entitled to judicial immunity for that conduct, even though he was not assigned to sit in that particular branch of the court); *King*, 973 F.2d at 354 (holding magistrate judge absolutely immune when directing a police officer to go to plaintiff's home and effect a warrantless arrest).

Similarly, here the Court cannot find that Judge Peed acted in *clear absence* of all subject matter jurisdiction. *Cf. Harris v. Deveaux*, 780 F.2d 911, 912 (11th Cir. 1996) (municipal judge had jurisdiction under O.C.G.A. § 17-7-22, and therefore immunity, when ordering a witness arrested after she testified at defendant's preliminary hearing, even though prosecutor informed judge that no charges would be filed); *Berg v. Cwiklinski*, 416 F.2d 929, 931 (7th Cir. 1969) (traffic court judge who imprisoned defendant for contempt without authority to do so was immune because he had subject matter jurisdiction over the traffic violation proceeding).

Appendix B

C. Rule 11 Sanctions

Judge Peed moves for Rule 11 sanctions, arguing that "even a cursory investigation of the law would have established that this cause of action is barred." Doc. # 3 at 7.

These sanctions are imposed when a party files a pleading that (1) has no reasonable factual basis; (2) is based on a legal theory having no foundation under current law and having no reasonable argument to change existing law; or (3) is in bad faith for an improper purpose. *Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003).

After performing its own investigation into the law (both sides here provide scant legal support for their positions), the Court cannot say that Hatcher's claims were so frivolous as to merit Rule 11 sanctions.

IV. CONCLUSION

Defendant F. Gates Peed's motion to dismiss (doc. # 3) is therefore ***GRANTED***, but his motion for Rule 11 sanctions (doc. # 3) is ***DENIED.*** Plaintiff Williams Hatcher's motion for entry of default judgment (doc. # 6) is ***DENIED*** and his Complaint is ***DISMISSED WITH PREJUDICE.***

This 21 day of December, 2004.

s/ B. Avant Edenfield
B. AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA